Bonanza Chemicals Sdn Bhd v Leaderpac Manufacturing Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1605 OF 2003
KANG HWEE GEE J
13 AUGUST 2009

Contract — Breach — Agreement — Goods sold and delivered to defendant by invoice — Payment of money due — Whether there was written contract between parties — Whether non-payment established — Defendant counterclaimed — Whether established

The plaintiff sold raw materials for making perfume to the defendant and would invoice the defendant for the goods supplied. The defendant would pack the perfume into readily useable and marketable product in the form of air fresheners and would invoice the plaintiff for the work done in the packaging using the packing material supplied by the plaintiff or purchased by the defendant for the plaintiff. In this case, the plaintiff claimed a sum of RM352,718.82 being payment due to the plaintiff for goods sold and delivered to the defendant by invoice. The defendant not only denied the plaintiff's claim, but counterclaimed for the sum of RM210,512.29 encompassing, inter alia, the non-payment by the plaintiff for the supply of air fresheners, alleged over-payment by the defendant to the plaintiff and the packaging materials (ready bottle and adjustable cap) which the defendant had supplied to the plaintiff. The plaintiff however, denied the defendant's counterclaim. In the course of submission, counsel for the plaintiff was prepared to admit that overall the plaintiff did still owe the defendant the sum of RM6,624 which should therefore be deducted from the sum owed to the plaintiff. Further, there was an admission in the testimony of PW2, the director of the plaintiff that the packaging materials bought by the defendant on behalf of the plaintiff were left in the defendant's factory and were later destroyed in the fire. There was no formal written contract between the plaintiff and the defendant with respect to the supply of perfume material by the plaintiff to the defendant and neither for the charges for the packing service provided to the plaintiff. The dispute between the parties was purely based on the question of whether the goods had been ordered, supplied, delivered and paid for on the part of each party with such adjustments of returns where allowable between the parties in respect of each invoice.

Held, allowing the plaintiff's claim with costs and allowing the defendant's counterclaim in part with costs:

(1) The invoices, delivery orders duly acknowledged and statement of

accounts being records kept in the normal course of business of the plaintiff company were admissible documentary evidence that the goods were supplied by the plaintiff to the defendant. The sum that was now due to be paid by the defendant to the plaintiff in respect of the 57 invoices should therefore be RM354,944.05 less RM91,032.38 equals to RM263,911.67, less RM6,624 which the plaintiff admitted owing to the defendant equals to RM257,287.67 and a judgment for this sum should be entered against the defendant with costs (see paras 14 & 20).

(2) The plaintiff did not deny that the sum of RM45,905.30 had not been paid. The fact that the goods were destroyed in the fire at the defendant's factory would not absolve the plaintiff from paying the defendant the sum of RM45,905.30 that it had expended to buy the goods for the plaintiff. The letter dated 14 December 2000 was sufficient to acknowledge that the plaintiff had taken possession of the goods which were kept at the factory. Therefore, this court allowed the defendant's counterclaim item (f) with costs (see paras 29–31).

[Bahasa Malaysia summary

Plaintif menjual bahan-bahan mentah untuk membuat minyak wangi kepada defendan dan akan menghantar invois kepada defendan bagi barangan yang dibekalkan. Defendan akan memasukkan minyak wangi ke dalam produk yang sedia untuk digunakan dan dipasarkan dalam bentuk penyegar-penyegar udara dan akan menghantar invois-invois kepada plaintif bagi kerja yang dibuat dalam pembungkusan menggunakan bahan pembungkusan yang dibekalkan oleh plaintif atau dibeli oleh defendan untuk plaintif. Dalam kes ini, plaintif menuntut wang sejumlah RM352,718.82 yang merupakan bayaran yang tertunggak kepada plaintif bagi barang-barang yang dijual dan dihantar serah dengan invois. Defendan bukan sahaja menafikan tuntutan plaintif, tetapi membuat tuntutan balas bagi wang sejumlah RM210,512.29 melingkungi, antara lain, kegagalan membayar hutang oleh plaintif bagi pembekalan penyegar-penyegar bekalan udara tersebut, dakwaan terlebih bayar oleh defendan kepada plaintif dan bahan-bahan pembungkusan (botol dan penutup boleh laras) yang defendan telah bekalkan kepada plaintif. Plaintif bagaimanapun, menafikan tuntutan balas defendan. Semasa penghujahan, peguam untuk plaintif bersedia untuk mengakui bahawa secara keseluruhan plaintif memang masih berhutang sejumlah RM6,624 kepada defendan yang mana sepatutnya ditolak dari jumlah yang dihutang kepada plaintif. Selanjutnya, terdapat satu pengakuan dalam testimoni PW2, pengarah plaintif bahawa bahan-bahan pembungkusan yang dibeli oleh defendan bagi pihak plaintif diletakkan dalam kilang defendan dan kemudiannya telah musnah dalam kebakaran tersebut. Tidak ada kontrak bertulis rasmi antara plaintif dan defendan berkenaan bekalan bahan pewangi oleh plaintif kepada defendan dan juga untuk caj-caj perkhidmatan

membungkus yang diberikan kepada plaintif. Pertikaian antara pihak-pihak adalah semata-mata berasaskan atas persoalan sama ada barangan tersebut telah dipesan, dibekalkan, diserahkan dan dibayar oleh setiap pihak dengan penyelarasan yang dibenarkan antara pihak-pihak terhadap setiap invois.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan membenarkan sebahagian tuntutan balas defendan dengan kos:

(1) Invois-invois, pesanan-pesanan penghantaran yang diakui penerimaan dan penyata akaun menjadi rekod-rekod yang disimpan dalam perjalanan urusan normal syarikat plaintif adalah keterangan dokumentar boleh diterima bahawa barangan tersebut telah dibekalkan oleh plaintif kepada defendan. Jumlah yang harus dibayar oleh defendan kepada plaintif berkenaan dengan 57 invois tersebut seharusnya adalah RM354,944.05 ditolak RM91,032.38 bersamaan dengan RM263,911.67, ditolak RM6,624 yang diakui oleh plaintif berhutang kepada defendan bersamaan RM257,287.67 dan penghakiman untuk jumlah ini harus dimasukkan terhadap defendan dengan kos (lihat perenggan 14 & 20).

(2) Plaintif tidak menyangkal bahawa sejumlah RM45,905.30 belum dibayar. Fakta bahawa barangan tersebut musnah dalam kebakaran di kilang defendan tidak akan membebaskan plaintif daripada membayar defendan RM45,905.30 yang ia telah gunakan untuk membeli barangan untuk plaintif. Surat bertarikh 14 Disember 2000 adalah mencukupi untuk mengakui bahawa plaintif telah mengambil milikan barangan yang disimpan di kilang itu. Lantarannya, mahkamah ini membenarkan item (f) tuntutan balas defendan dengan kos (lihat perenggan 29–31).]

Notes

For cases on agreement, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2573–2580.

Legislation referred to

Evidence Act 1950 s 73A

Alex Chang Huey Wah (Alex Chang & Co) for the plaintiff.
CK Ng (Tan, Ng & Ong) for the defendant.

Kang Hwee Gee J:

[1] The plaintiff's claim is for the sum of RM352,718.82 being payment due to the plaintiff for goods sold and delivered to the defendant by invoice.

[2] The plaintiff sold raw materials for making perfume to the defendant and would invoice the defendant for the goods supplied.

[3] The defendant would pack the perfume into readily useable and marketable product in the form of air fresheners and would invoice the plaintiff for the work done in the packaging using the packing material supplied by the plaintiff or purchased by the defendant for the plaintiff.

[4] The defendant denies the plaintiff's claim.

[5] The defendant counterclaimed the sum of RM210,512.29 being:

(a) over-payment of RM2,500, RM25,162.94 and RM8,875 which the defendant alleged had been paid to the plaintiff by the defendant;

(b) credit sum of RM2000 for the return of goods supplied by the plaintiff which should have been credited in favour of the defendant by the process of contra accounts;

(c) sum of RM90,321.20 due to the defendant which has not been paid by the plaintiff in respect of the supply of air freshener;

(d) sum of RM15,000 for packaging materials (ready bottle and adjustable cap) which the defendant had supplied to the plaintiff and which the plaintiff had rejected. It was agreed between the parties that this sum is to be credited to the defendant's account and the goods were to be returned to the defendant;

(e) debit note of RM20,747.85 which should have been credited to the defendant's account which was not so credited. This is in respect of payment which the defendant had made on the instruction of the plaintiff for the purchase of container, insert and adjustable cap to be used for packaging the plaintiff's perfume; and

(f) packaging materials which the defendant bought for the plaintiff to be used to pack the plaintiff's raw materials amounting to RM45,905.30. The said packaging materials were left at the defendant's factory and were subsequently destroyed by fire at the factory. The said sum had not been paid to the defendant by the plaintiff.

[6] The plaintiff denies the defendant's counterclaim.

FINDING AND DECISION

[7] There is no formal written contract between the plaintiff and the defendant with respect to the supply of perfume material by the plaintiff to the defendant and the charges for the packing service provided to the plaintiff. The

dispute between the parties lies purely on the question of whether the goods had been ordered, supplied, delivered and paid for on the part of each party with such adjustments of returns where allowable between the parties in respect of each invoice.

[8] To prove its case, the plaintiff produced the following documents:

(a) Statement of account (exh P29) from 3 August 2000 until 20 August 2002 respecting transactions the subject matter of the claim showing RM352,718.82. The statement of account takes into consideration two contra notes of RM1,611.83 and RM613.40 being contra notes for goods supplied by the defendant.

(b) Invoices P2 bundle B1 covering all the goods supplied from 3 August 2000 until 20 August 2002 for the sum of RM354,944.05 less the sum of RM1,611.83 and RM613.40 being contra notes for goods supplied by the defendant = RM352,718.82.

(c) Delivery orders covering the same period for the supply of raw materials to the defendant duly acknowledged by the defendant (P2 bundle B1). There are 57 delivery orders corresponding to the 57 invoices amounting to RM354,944.05. Only one was without a chop of the defendant but contained a name and IC number and one more with a lorry number and an IC number only. The two totaled approximately RM22,715.02. The defendant admitted in bundle A2 in the statement of defence para 2 and also the defendant's witness statement DW1 Q84 examination-in-chief.

(d) Letter of demand dated 26 February 2003 demanding the sum of RM352,718.82 as at 26 February 2003 (plaintiff's bundle B9 P30 p 1248A).

[9] In addition it relied on some unsubstantiated documents prepared by the defendant in the course of the trial. They are:

(a) The defendant's creditor ledger (P6 B9 p 1251) as exhibited in the affidavit of the defendant's witness DW2 in Shah Alam Court Case No MT4–22–457 of 2003 showing that the defendant is owing the plaintiff RM274,079.59 in respect of the same transaction. See cross-examination Q83, 84 and 85 of DW1 where the witness agreed that the reconciliation done by the plaintiff raising the sum RM352,718.82 was correct.

(b) The defendant's debtor ledger which shows that the plaintiff owes the defendant RM84,716.13.

[10] These documents were of no evidential value and were at best documentary hearsay which should be ignored. However counsel for the plaintiff in the course of his submission was prepared to admit that overall the plaintiff did still owe the defendant the sum of RM6,624 which should therefore be deducted from the sum owed to the plaintiff.

[11] The plaintiff's claim as disclosed in its statement of claim arose from 57 invoices totaling RM354,944.05. From this sum deductions were made from two contra notes Nos CTR003/05/01 and CTR005/10/02 for the sums of RM1,611.83 and RM613.40 respectively thereby arriving at the net amount of RM352,718.82.

[12] The invoices and the delivery orders were produced by the accounts manager of the plaintiff company PW1 (Lee Chee Meng) who had custody of the records of the company.

[13] The statement of account was produced by a director of the plaintiff Chong Chiew Thong (PW2) but was prepared by his wife (Joyce Lee) who had since passed away.

[14] The invoices, delivery orders duly acknowledged and statement of accounts being records kept in the normal course of business of the plaintiff company are admissible documentary evidence that the goods were supplied by the plaintiff to the defendant and that the sum of RM352,718.82 less RM6,624 which the plaintiff now admitted was the only sum owed to the defendant.

[15] The evidence of PW1 Lee Chee Meng based on the business records of the plaintiff is admissible under s 73A of the Evidence Act 1950 to prove that the goods were invoiced, delivered and received by the plaintiff to the defendant but had not been paid for.

[16] On the other hand, the defendant was unable to produce any evidence to show that it *had not received the goods and had paid for them*.

[17] The accountant Mr Yee Hun Leek (DW3) called by the defendant criticised the method and accuracy of the plaintiff's business account kept by the plaintiff which did not prove that they were unreliable and should not be accepted. His evidence needless to say was of no evidential value.

[18] However, as submitted by counsel for the defendant the deductions of RM1,611.83 and RM613.40 vide contra notes Nos CTR003/05/01 and CTR005/10/02 as stated in the plaintiff's statement of claim were clearly

erroneous as the original contra notes in the plaintiff's own debtors ledger produced by the plaintiff as bundle B2 at pp 156 and 154 show contra sums of RM22,242.34 and RM68,790.04 respectively.

[19] The total sum that should be deducted (ditolak) from the sum owed by the defendant to the plaintiff should be RM91,032.38 and not RM2,225.23 (as stated in para 1 of the plaintiff's statement of claim).

[20] The sum that is now due to be paid by the defendant to the plaintiff in respect of the 57 invoices should therefore be RM354,944.05 less RM91,032.38 equals to RM263,911.67, less RM6,624.00 which plaintiff admitted owing to the defendant equals to RM257,287.67 and a judgment for this sum should be entered against the defendant with costs.

THE DEFENDANT'S COUNTERCLAIM

[21] The defendant was unable to prove the items (a)–(e) of the counterclaim referred to above.

[22] Its witness Ms Chung Yun Moi (DW1) who was in charge of the business account of the defendant admitted in her witness statement that the defendant's business account detailing the business transaction between the plaintiff and the defendant had been destroyed by flood and fire (see answers to witness statement DW1 questions 8, 9, 14, 15, 18 and 18A).

[23] However, in respect of item (f) of the counterclaim the defendant should be allowed to succeed for the following reasons.

[24] The letter dated 14 December 2000 (bundle C1 pp 68–69) confirmed the existence of the goods and that they were kept at the defendant's factory and had been acknowledged by Joyce Lee, the accounts clerk of the plaintiff, before the factory was burnt down and the goods destroyed. Mr Chong Chiew Thong (PW2) was able to identify the signature of his wife who acknowledged in the letter which read as follows:

OUR REF: LD1432 Date: 14th December, 2000

BONANZA CHEMICALS SDN. BHD. 608, Jalan 22, Taman Perindustrian Ehsan Jaya, 52100 Kepong Kuala Lumpur Tel: 03-62771533 Fax: 03-62778508

Dear Sir,

RE: STOCK IN OUR FACTORY

We would like to inform you the followings:

A	CARTON BOX Q	QTY	UNIT PRICE	AMOUNT
	Jape Press Once	360	RM2.40	RM 864.00
	300 ml Jape Spray	860	RM2.10	RM1,806.00
	70gms Air Freshener *2 in 1*	30	RM2.00	RM 60.00
	70gms Air Freshener *4 in 1*	18	RM2.00	RM 36.00
	150gms Jape Clear	15,000	RM0.65	RM9,750.00
			SUB-TOTAL :	RM12,516.00

B	BLISTER CARD			
	Jape Press Once *Orange* *Lemon* *Strawberry*	35,350	RM 0.25	RM8,837.50
	Fres Zone Press Once	34,860	RM0.25	RM8,715.00
	Jape Press Once Refill *Orange* *Lemon* *Strawberry*	15,050	RM0.20	RM3,010.00
			SUB-TOTAL:	RM20,562.50

C	PAPER HOLDER PRESS ONCE			
	Jape Press Once *Orange* *Lemon*	27,500	RM0.13	RM3,575.00
	Fres Zone Press Once	34,860	RM0.13	RM4,531.80
			SUB-TOTAL:	RM8,106.80

D	JAPE PLASTIC PRESS ONCE HOLDER			
	Jape Press Once Plastic Holder *Orange* *Strawberry*	11,800	RM0.40	RM4575.00
			SUB-TOTAL:	RM4,720.00
			GRAND TOTAL:	RM45,905.30. ==========

Thank you.

Yours faithfully, EADERPAC MFG. SDN. BHD. t.t.. MR. S.C. HENG	Agreed and Confirmed by : BONANZA CHEMICALS SDN. BHD. t.t. 6/6/2001... Company Chop and Signature

[25] There is an admission in the testimony of Mr Chong Chiew Thong (PW2, director of the plaintiff) that the packaging materials bought by the defendant on behalf of the plaintiff were left in the defendant's factory and were later destroyed in the fire.

[26] This was what Chong Chiew Thong said: 'This is the raw material and packaging for the finished product the plaintiff was purchasing from the defendant' (Answer to cross-examination in question 52 of PW2).

[27] The evidence that the goods were purchased by the defendant for the plaintiff is also clear from the evidence of Ms Chung Yun Moi by her witness statement (DW1):

> Q112: May I refer to the Defendant's letter dated 14th December 2000 confirming Defendant is keeping stocks of RM45,720.00 at page 68 and 69 of Ikatan Dokumen Defendan. Who confirmed and signed the letter for Plaintiff? Joyce Lee who was Bernard Chong's wife.
>
> Q113: Before the letter from Plaintiff's solicitors requesting to inspect the stocks did the Plaintiff before that ever request to inspect the stocks? No.
>
> Q114: Did Defendant remind the Plaintiff to come to collect the stocks? Yes.
>
> Q115: Who is Plaintiff's officer you remind to come to collect the stocks? Joyce Lee.
>
> Q116: What did Joyce Lee tell you when you reminded her? She said keep the stocks there first.

[28] The defendant had not deemed it fit to mention directly in its evidence that this sum had not been paid by the plaintiff to the defendant (due probably to the fault of its counsel in drawing up the witness statement). But it is clear that the defendant was making a claim for payment of these goods and that it had not been paid. This can be deduced from the correspondence entered into between the parties with respect to the inspection of the goods requested by the plaintiff before the fire. There could be no reason for the plaintiff to ask for inspection of the goods if they had not been purchased for the plaintiff and if the defendant was not asking for payment. See letter by the plaintiff dated 15 August 2006 (P34).

[29] The plaintiff did not deny that this sum of RM45,905.30 had not been paid.

[30] The fact that the goods were destroyed in the fire of the defendant's factory would not absolve the plaintiff from paying the defendant the sum of RM45,905.30 that it had expended to buy the goods for the plaintiff.

[31] The letter dated 14 December 2000 is sufficient to acknowledge that the plaintiff had taken possession of the goods which were kept at the factory. The counterclaim item (f) should therefore be allowed with costs.

Plaintiff's claim allowed with costs and the defendant's counterclaim allowed in part with costs.

Reported by Ashgar Ali Ali Mohamed